Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

TEAMSTERS UNION LOCAL NO. 115,
a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Petitioner

and

HAROLD FISHER and JOSHUA JOHNSON,
Additional Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was the National Labor Relations Board entitled to invoke the civil jurisdiction of the federal court and, at the same time, refuse to comply with the discovery provisions of the Federal Rules of Civil Procedure?

2. Was it lawful to hold a union and its members in civil contempt of an order restraining the union from picketing activities coercive of "any" employer, where a) the finder of fact acknowledged there was no evidence the union had authorized, participated in or ratified the allegedly contumacious acts; and b) the court's sole justification for issuing such a broad restraining order in the first instance was that during three of the many strikes conducted by union members against various employers over nearly two decades, picketing violations by union members had occurred?

3. Did the imposition of a mandatory prospective fine schedule, without opportunity for a purge, render the contempt proceeding criminal in nature?

4. Was the heavy mandatory fine schedule, imposed without relation to the severity of the infraction and without opportunity for a purge, excessive by constitutional standards and violative of due process?

5. Did the intrusive discovery into union activities ordered by the Court of Appeals violate the due process and associational rights of the union and its members?

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REPORTS OF OPINIONS

The Court of Appeals did not issue an opinion in support of its contempt adjudication. Its memorandum opinion in support of the original restraining order was unreported. The divided decision of the National Labor Relations Board adopting the restraining order was reported at 275 N.L.R.B. 1547 (1985).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals denying a rehearing was entered on August 31, 1995. Jurisdiction to review the said order by writ of certiorari is conferred on this Honorable Court by 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals was premised upon 29 U.S.C. § 160(e).

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law ... abridging the right of the people peaceably to assemble ...

FIFTH AMENDMENT

No person shall ... be deprived of ... liberty or property, without due process of law ...

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defence.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed ...

STATEMENT OF THE CASE

This matter has its origin in a 1984 labor dispute between petitioner Teamsters Local 115 and Gross Metal Products, Inc., a nonparty to the present proceeding. Gross Metal Products filed an unfair labor practice charge against the union, alleging picket line misconduct at its facility. The union and general counsel to the National Labor Relations Board ("the Board") agreed to a settlement whereby the union would desist from restraining or coercing the employees of Gross Metal Products, or of any other employer doing business with Gross Metal Products, by obstructing ingress and egress to the facility, threatening or assaulting employees, damaging property and mass picketing.

Gross Metal Products objected. The administrative law judge recommended that an order be entered directing the union to desist from restraining or coercing the employees of any employer.

By a 2-to-1 decision, a panel of the Board approved the recommendation. The dissenting member voted to enforce the settlement, because it "fully protects the Charging Party's interests" by "providing 'a broad remedy with respect to conduct at the Employer's facility'" and "effectuates the policies of the Act." Teamsters Local 115 and Gross Metal Prod., Inc., 275 N.L.R.B. 1547 (1985).

The Court of Appeals for the Third Circuit, in an unpublished memorandum opinion, entered the expansive order requested by the panel. To find support for its order, the Court had to look back nearly two decades, during which the union had engaged in numerous strikes and labor disputes.

The Court located a grand total of three cases of misconduct by union members. The most recent was eight years old. It involved a bargaining unit of only seven employees and an employer who was itself found guilty of unfair labor practices. Local 115, Int'l. Bhd. of Teamsters (Martin J. Sobol), 238

N.L.R.B. 1070 (1978). Nonetheless, the Court insisted that such isolated and limited "prior violations may support broad remedial orders," regardless of their "mere remoteness in time."

During the next eight years, not a single violation of the order was found or even alleged. The union's numerous strikes and labor disputes were conducted in full compliance with the order.

In 1992 and 1993, the union conducted five strikes which gave rise to charges by both the union and the employers. Upon the conclusion of three of the strikes, both the union and the employer moved to withdraw or dismiss all charges.

The Board refused to approve the withdrawal of the employers' charges. It instead referred them to the Board's contempt litigation branch, which initiated the present action by filing a petition with the Court of Appeals to have the union adjudicated in civil contempt.

On November 22, 1993, the matter was assigned to a Special Master for a hearing. A pretrial conference was scheduled for January 18, 1994. On January 10th, the Board and the union discussed pretrial discovery. The parties agreed to a mutual exchange of documents in accordance with the Civil Justice Expense and Delay Reduction Plan. The taking of depositions was discussed.

When the conference was cancelled due to inclement weather, the Special Master instructed the parties to file position statements. He also directed the parties to initiate discovery. The union maintained that it was entitled to be fully informed of the Board's allegations.

On March 24, 1994, the parties voluntarily exchanged certain documents. Instead of providing the affidavits it had taken from its witnesses, the Board submitted its "First Pretrial Disclosure Statement." The statement was, in essence, a witness list. It identified the witnesses the Board expected to produce at trial, without even disclosing the allegations regarding

which each witness was expected to testify.

The union promptly notified the Board that merely identifying its witnesses did not constitute compliance with the Plan. The union was entitled to discover witness statements, videotapes, incident reports and other relevant documents the Board had acknowledged were in its possession. In response to the Board's apparent noncompliance, the union also served a request for production of documents on the Board, specifically requesting witness affidavits and videotapes.

On April 7, 1994, the Master scheduled a conference for April 21, 1994 to resolve any discovery disputes. The following day, the Master notified the parties that the hearing on the contempt petition would begin on May 3, 1994.

The union promptly wrote a letter to the Master stating that the proposed hearing date was premature, because the union had not yet received any of the Board's witness statements and videotapes. Accordingly, the union had not had an opportunity to assess the relative importance of each witness and determine the depositions it would require.

On April 14, 1994, the Board responded. Although the Board was seeking an adjudication of civil contempt, it invoked a criminal statute known as the Jencks Act[1] and asserted that it was not required to provide the statement of any witness until after the witness testified on direct examination. The Board further asserted that it was not required to comply with the discovery provisions of the Federal Rules of Civil Procedure, because it did not apply them in its own administrative agency proceedings. It refused to acknowledge that, by electing to proceed in the federal court, it had bound itself to comply with the rules of its chosen forum.

On April 22, 1994, the union moved to compel production

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[1] P.L. 85-269, 71 Stat. 595, 18 U.S.C. § 3500.

of the documents it had requested. Without receiving a response from the Board, on April 28, 1994, the Master summarily denied the union's motion.

On May 21, 1994, the Board amended its petition for an adjudication of civil contempt. The Master continued the hearing for a mere two days.

On May 5, 1994, the hearing began. The Board eventually presented 33 witnesses to testify with respect to 56 allegations. In every instance, the statement of the witness was not given to the union until after the witness testified on direct examination.

On May 17, after three days of testimony, the union requested a stay to take discovery based upon the witness affidavits. The Master denied the motion, and the hearing continued.

On July 13, 1994, prior to the due date for post-trial statements, the union moved for the dismissal of all charges. It pointed out that the penalties demanded by the Board included a heavy prospective fine schedule, rendering the proceeding criminal in nature under United Mine Workers v. Bagwell, 114 S. Ct. 2552 (1994). The Court of Appeals denied the motion without comment on September 2, 1994.

The Special Master issued his report and recommendation on October 12, 1994. Although he acknowledged that the Board failed to show that the union had authorized, participated in or ratified any of the incidents, he concluded that its failure to prevent them constituted civil contempt.

The union was able to prove that it had issued written instructions to each picket, specifically directing all pickets not to threaten employees, block ingress or egress and engage in mass picketing and other enumerated conduct prohibited by the June 1986 order and the National Labor Relations Act. Although the Master adverted to the issuance of the instructions in his report (p. 33), he made no findings regarding their adequacy and compliance with the June 1986 order.

The union also demonstrated that any instances of member-

ship misconduct were isolated events which took place during the prolonged strikes and were promptly remedied. While the Master mentioned the union's removal of a noncompliant picket (pp. 31-32), he did not make findings concerning its compliance efforts.

Instead, he effectively applied a strict liability standard: because violations had occurred, the union must not have taken steps to prevent them. Ergo, it should be held in contempt. The union's evidence regarding its good-faith efforts to achieve compliance was ignored.

The Special Master summarily rejected all of the union's arguments. He dismissed the Board's refusal to comply with F.R.Civ.P. 34 (regarding the pretrial production of documents) as immaterial. With regard to the Bagwell issue, the Master stated that because it had been before the Court of Appeals when it considered the union's motion to dismiss the charges, he was not required to address it.

On January 13, 1995, the Court of Appeals issued an order adjudicating the union and two of the members (Fisher and Johnson) in civil contempt. The parties were directed to submit briefs addressing the appropriate remedy.

The Board demanded a prospective fine schedule of $10,000 per violation against the union and $1,000 for each day the violation continued. The Board further demanded fines of $1,000 per violation against each member and $500 for each day the violation continued. In addition, the Board demanded the union's membership list with addresses, copies of sign-in sheets from future picket lines and notification of the captains of future picket lines.

The union responded that the fines were criminal under Bagwell, entitling the union to a panoply of criminal protections it has not been given. In addition, the union pointed out, the fines were unwarranted and excessive. There was not a single instance of serious physical injury or substantial property damage. The various incidents complained of were limited to

blocking access, gluing locks and empty threats.

While each of the five strikes had lasted, on average, about six months, and the Board had access to over 1600 hours of videotape, it introduced only about one hour of videotape at the hearing. That was because the picket lines were reasonably peaceful for the most part. The occasional incidents of flared tempers were to be expected and did not evince a planned pattern of lawlessness.

Lastly, the union opposed the highly intrusive discovery into its activities proposed by the Board. As a matter of constitutional right, the bureaucratic convenience of the Board could not be given precedence over the associational rights of the union and its right and duty to fairly represent the interests of its members.

On July 20, 1995, the Court issued an order which, inter alia, imposed the prospective fine schedule proposed by the Board. In addition, the Court granted the Board's demand that the union produce its membership lists, maintain sign-in sheets at all future picket lines, designate picket captains for all shifts and furnish their names to the Board upon request.

The union timely petitioned for a rehearing. On August 31, 1995, its petition was denied. This petition for a writ of certiorari followed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THIS CASE RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION IN THIS COURT: WHETHER THE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO INJUNCTIVE AND/OR CONTEMPT PROCEEDINGS BROUGHT BY THE N.L.R.B. IN THE FEDERAL COURTS

This Court has held that the government as a litigant is, like any other litigant in the federal courts, subject to the rules of discovery. United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958). However, this Court has not specifically addressed whether the discovery provisions[2] of the Federal Rules of Civil Procedure apply to injunctive and/or contempt proceedings brought by the National Labor Relations Board in the federal courts.

F.R.Civ.P. 81(a)(5) expressly provides that "in respects not covered by" 29 U.S.C. §§ 159 and 160 (governing enforcement proceedings brought by the Board), "the practice in the district courts shall conform to these rules so far as applicable." The statute does not cover discovery procedure. Accordingly, several lower courts have held that the discovery provisions of the Federal Rules of Civil Procedure apply where the Board brings an action for injunctive relief pursuant to 29 U.S.C. § 160(j). Kobell v. Reid Plastics, Inc., 136 F.R.D. 575, 579 (W.D. Pa. 1991); Meter v. Minnesota Mining and Mfg. Co., 42 F.R.D. 663 (D. Minn. 1967); Fusco v. Richard W. Kaase Baking Co., 226 F. Supp. 459, 463 (N.D. Ohio 1962). It has also been held that the Rules apply to actions for injunctive relief brought pursuant to 29 U.S.C. § 160(l). Sperandeo v. Milk Drivers & Dairy Employees Local 537, 334 F.2d 381 (10th Cir. 1964); Madden v. Milk Wagon Drivers Union Local 753, 229 F. Supp. 490, 492 (N.D. Ill. 1964). Such judicial proceedings have been distinguished from hearings conducted before the Board itself and not involving resort to the courts by the government.

The Board nonetheless succeeded in claiming that it is not

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[2] This Court has recognized that the pleading requirements and the rules governing joinder of claims apply to damage actions brought pursuant to the National Labor Relations Act. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

bound by the Federal Rules of Civil Procedure. As a result, the union was deprived of the benefits of both civil and criminal law; it was denied access to the pretrial discovery allowed by civil law, and it was denied access to a jury trial and other rights accorded a criminal defendant. A writ of certiorari should issue in order to clarify whether the Federal Rules of Civil Procedure apply to injunctive and/or contempt proceedings brought by the Board.

II. IT IS NECESSARY FOR THIS COURT TO REVISIT AND CLARIFY THE "KNOWING TOLERANCE" STANDARD FIRST ENUNCIATED BY THIS COURT IN GIBBS

In order to hold the union itself responsible for the illegal activities of its members, there must be "clear proof that the organization ... charged with responsibility for the offense actually participated, gave prior authorization or ratified such acts after actual knowledge of their perpetration." United Bhd. of Carpenters v. United States, 330 U.S. 395, 403 (1947). Accord Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 218 (1979). It is not enough to show that random misconduct occurred which the union only learned of afterward. Rather, there must be proof that the union "participated actively or by knowing tolerance" in the misconduct. United Mine Workers of America v. Gibbs, 383 U.S. 715, 739 (1966).

That standard was not met. As the Special Master repeatedly acknowledged in his report, there was no evidence that the union had authorized any of the wrongful acts. That is because the evidence was to the contrary; i.e., the union had attempted to control the conduct of its members by issuing specific instructions to its picketing members, removing noncompliant members and other measures.

The Special Master recommended that the union be held in contempt solely because the measures it relied upon did not

succeed in completely regulating the conduct of its members. In essence, he applied a strict liability standard, equating any failure of the union's efforts with the "knowing tolerance" required by Gibbs. That was patently erroneous.

Not only that, but the original restraining order was itself without foundation. The restraining order had issued simply because the Court of Appeals looked back nearly two decades and located three other cases in which striking union members violated the National Labor Relations Act.

During those years, the union had engaged in numerous strikes and labor disputes. There was no evidence that the union had consistently authorized, participated in or ratified picket line misconduct. To the contrary, the most "recent" of the cases upon which the Court relied was eight years old and involved a mere seven employees and an employer who was itself found guilty of violating the Act (thereby provoking its employees into retaliating). The fact that the union's largely peaceful picketing record was marred by the occasional intemperate conduct of individual members did not demonstrate that the union itself had "knowingly tolerat[ed]" those outbursts.

This Court should grant certiorari in order to clarify the "knowing tolerance" standard. It is clear from the Special Master's stated reliance upon the decisions of the Board itself that the Board has misinterpreted Gibbs. Because it is patently unjust to hold a union strictly accountable for any failure in its efforts to maintain order, it is time to revisit Gibbs for the guidance of all concerned.

III. IT IS IMPORTANT FOR THIS COURT TO CLARIFY WHETHER BAGWELL APPLIES TO THE SECOND STAGE OF CONTEMPT PROCEEDINGS, WHERE THE DEFENDANT IS THREATENED WITH THE FIXING OF A MANDATORY FINE SCHEDULE

This case raises an important opportunity to clarify whether Bagwell means that a defendant charged with out-of-court disobedience to a complex injunction is entitled to a jury trial when threatened with the fixing of a serious mandatory fine schedule, or whether the right to a jury trial must await the third stage of contempt proceedings (imposition of the predetermined fines).

Due process dictates that the defendant's right to a jury trial should not depend upon the stage of the contempt proceeding. Regardless whether the court has been asked to adjudicate violations of a complex injunction and determine a mandatory fine schedule, or to impose the predetermined fines, the defendant is entitled to impartial fact-finding. In both instances, difficult proof problems must be resolved. In both instances, the "core justification" for avoiding a jury trial — to wit, that the court must have the ability to conduct the proceedings immediately before it — is not implicated. Therefore, due process demands greater procedural safeguards than were provided where, as here, the same court was asked to issue a restraining order, adjudicate its violation and determine the appropriate penalties.

Indeed, criminal contempt sanctions may not lawfully be "imposed on some who has not been afforded the protections that the Constitution requires of such proceedings." Hicks v. Feiock, 485 U.S. 624, 632 (1988). Indirect contempts such as those at issue here, involving out-of-court disobedience to complex injunctions and the fixing of mandatory prospective fines, are presumptively criminal in nature. Bagwell. Regardless of their classification, however, such contempts implicate the defendant's right to a trial by jury because of the elaborate and neutral fact-finding they require.

The union and its members were denied that right. Following a trial by ambush (owing to the Board's noncompliance with the Federal Rules of Civil Procedure), they were

subjected to a nonjury hearing before a Master who refused to consider their good-faith efforts to achieve compliance with the June 1986 order and other substantive defenses. Certiorari should be granted to clarify that the serious constitutional concerns addressed in Bagwell exist at the second stage of contempt proceedings and may not be ignored.

IV. THIS CASE PRESENTS IMPORTANT ISSUES REGARDING THE VALIDITY OF MANDATORY PROSPECTIVE FINE SCHEDULES AND INTRUSIVE GOVERNMENTAL ACCESS TO UNION INFORMATION AND ACTIVITIES

"[I]n contempt proceedings, courts should never exercise more than 'the least possible power adequate to the end proposed.'" United States v. United Mine Workers of America, 330 U.S. 258, 332 (1947). Prospective fines are an extreme remedy which should rarely be employed. N.L.R.B. v. Trailways, Inc., 729 F.2d 1013, 1023 (5th Cir. 1984); Florida Steel Corp. v. N.L.R.B., 648 F.2d 233, 240 (5th Cir. 1981).

The "end proposed" in this instance was to prevent future picket line misconduct similar to that found to have taken place: blocking ingress and egress, gluing locks and making threats. The "remedy" imposed by the Court of Appeals was punitive and out of all proportion to the nonviolent conduct it sought to curb.

A glued lock may be readily and inexpensively remedied. Imposing a mandatory $10,000 fine per glued lock is neither reasonable nor necessary. Far more limited coercive sanctions would have been sufficient to accomplish the desired result. By the same token, a mandatory $10,000 fine, to be levied upon the making of any threat, regardless of its heat-of-the-moment character or the apparent inability or unwillingness of the maker to carry it out, is not justified. The same is true of sanctioning the union $10,000 if the appointment of a picket captain is overlooked on a single shift.

Not only was the mandatory fine schedule unduly harsh, but the court denied the union any opportunity for a purge. However minor the infraction, the $10,000 fine is to be imposed. Under the circumstances, it is clear that the Court of Appeals exercised a great deal more than the "least possible power adequate to the end proposed." For this reason, its fine schedule was excessive by constitutional standards and violated due process. Id. at 304.

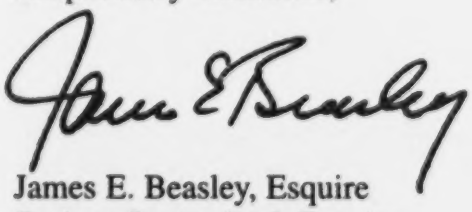
The intrusive discovery into the union's membership and picketing activities authorized by the Court's order also was unwarranted and unconstitutional. The Board does not need the union's membership lists to determine whether its picket lines are peaceable. It does not need to know the identities of the picket line captains, in the absence of actual violations. The order can only be viewed as an effort by the Board to chill the associational and grievance rights of the union.

It is crucial that unions remain free to express the legitimate grievances of their members. Certiorari should be granted to determine whether inflexible mandatory fine schedules and intrusive discovery orders constitute "the least possible power adequate to the end proposed."

CONCLUSION

Wherefore, it is respectfully requested that a writ of certiorari issue.

Respectfully submitted,



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